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Supreme Court, U.S.
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No. 01-888

IN THE

Supreme Court of the United States

CHOICE HOTELS INTERNATIONAL, INC.,

Petitioner,

v.

JAMES L. TICKNOR; JANET TICKNOR; LARRY TICKNOR; TICKCO HOLDING, L.L.C.; AND TICKNOR LODGING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL FRANCHISE COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The future of franchising — which today accounts for upwards of fifty percent (50%) of all retail sales transacted in the United States and which *per force* relies on uniform contracts to achieve uniform franchise unit appearance and operations — will be placed in grave peril if the decision of the Ninth Circuit sought to be reviewed herein is not, following such review, reversed as a matter of law. So, too, will the Lanham Act (15 U.S.C. §§ 1051 *et seq.*) and Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.*) be stripped of their intent.

Thus, the National Franchise Council (a Washington, D.C. not-for-profit corporation) respectfully submits this *amicus curiae* brief in support of Petitioner Choice Hotels International, Inc.'s petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The National Franchise Council is a not-for-profit corporation whose membership is restricted to our nation's largest and most reputable franchisors, as identified below. The National Franchise Council is dedicated to fostering a legal and regulatory environment favorable to franchising's continued growth and success. This goal is achieved in part through the National Franchise Council's alternative law enforcement program, which has been adopted on a trial basis

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1. Pursuant to United States Supreme Court Rule 37.3(a), counsel of record has filed letters with the Clerk of Court consenting to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

by the Federal Trade Commission (which regulates franchising for the federal government) and by certain states administering franchise-specific statutes.

The National Franchise Council's members[2] own and administer the following franchise networks:

AmeriHost Inns	Inter-Continental Hotels
AmeriSpec Home Inspection	Jackson Hewitt Tax Service
Arby's Restaurants	KFC
Avis Car Rental	MainStay Suites
Baskin-Robbins Ice Cream	Merry Maids
CENTURY 21 Real Estate	Pizza Hut
Churchs Chicken	Popeyes Chicken & Biscuit
Cinnabon	Quality Inns
Clarion Hotels	Ramada Hotels
Coldwell Banker Real Estate	Rodeway Inns
Comfort Inns	Seattle Coffee Company
Crowne Plaza Hotels	ServiceMasterClean
Days Inns	Sheraton Hotels
Doubletree Hotels	Sleep Inns
Dunkin' Donuts	St. Regis Hotels
Econo Lodge Hotels	Super 8 Motels
Embassy Suites Hotels	T.J. Cinnamons
	Taco Bell
	Terminix

2. *AFC Enterprises, Inc.; Allied Domecq QSR, Inc; Cendant Corporation; Choice Hotels International, Inc.; Hilton Hotels Corporation; Marriott International, Inc.; Medicine Shoppe International, Inc. Meineke Discount Muffler Shops, Inc.; Midas International, Inc.; Pearle Vision, Inc.; The ServiceMaster Company; 7-Eleven, Inc.; Six Continents Hotels, Inc.; Starwood Hotels & Resorts Worldwide, Inc.; Triarc Restaurant Group; and, Tricon Global Restaurants, Inc.*

ERA Real Estate	Togo's
Four Points Hotels	Torrefazione Italia
Furniture Medic	Restaurants
Hampton Inns	Travelodge Hotels
Hilton Hotels	TruGreen-ChemLawn
Holiday Inns	Westin Hotels
Homewood Suites	
Howard Johnson Hotels	

SUMMARY OF ARGUMENT

Amicus curiae National Franchise Council (an organization whose membership is restricted to the nation's largest and most reputable franchisors) respectfully submits that the Ninth Circuit Court of Appeals grievously erred when it held that the arbitration clause contained in Respondent Ticknor's Choice Hotels franchise agreement was a "contract of adhesion," unenforceable due to its purported "unconscionability."

The Choice Hotels franchise agreement which Respondent Ticknor executed was deliberately pursued by Respondent Ticknor, and thereafter executed by him, to the exclusion of thirty-one (31) alternative franchise relationships which he chose to spurn. Unlike the factual setting in *Iwen* (cited and quoted below) — the Montana Supreme Court decision almost exclusively relied on by the Ninth Circuit in rendering its decision *sub judice* — there was no marketplace or any other compulsion attending Ticknor's entry into his franchise agreement, only Ticknor's desire to execute same. He could have remained an "independent," unaffiliated hotel owner, but instead pursued a franchise relationship. Respondent Ticknor could have selected another of the thirty one alternative hotel franchises available to him, but he pursued Choice Hotels. Now, Respondent Ticknor complains

that the very contract be pursued, wanted and obtained — the contract he executed absent any compulsory circumstance — is adhesive and unconscionable. Such a conclusion has no support at law, and the Ninth Circuit erred when it held otherwise.

True it is that Ticknor's franchise agreement was largely non-negotiable. But that does not *ipso facto* render it a "contract of adhesion." Franchising — which in the past fifty years has grown so exponentially that today it accounts for nearly 50% of all retail sales consummated in the United States — has as its bedrock the need to respond to the public's desire, indeed demand, for complete franchise unit uniformity. To meet this consumer demand, each unit in virtually every franchise network must operate under the same name and commercial symbol; sell the same products or services; and, have the same appearance and trade dress. It is this very operational uniformity that the Lanham Act not only anticipates but demands, uniformity which maintains the value of a franchisor's trademark and service mark while promoting consumer welfare by meeting consumer expectations.

Only through identical franchise agreements can a franchisor achieve such franchise unit uniformity. But the fact that any given network's franchise agreements are uniform and frequently non-negotiable does not render them "contracts of adhesion" because franchisees, like Respondent Ticknor, have a universe of franchise alternatives to select from (Ticknor had thirty one) and thus confront no compulsory contractual setting. As a matter of law, when one contract is selected to the exclusion of many others available, and when no contract at all is necessary to begin with (Ticknor

could have operated as an "independent," like so many others), no "contract of adhesion" may result — even when the contract selected is non-negotiable.

Further, it is impossible to contend that the subject arbitration clause was "unconscionable" because it was not within Respondent Ticknor's "reasonable expectation" — which may explain why the Ninth Circuit utterly ignored this second prong of Montana's two prong "unconscionability" test when rendering its decision. Pursuant to federal and state law (as cited and discussed below), Ticknor received full and complete advance disclosure in narrative form regarding each and every aspect of the subject Choice Hotels franchise agreement — including the arbitration clause at issue herein. Also by operation of law, Ticknor was required to delay executing his Choice Hotels franchise agreement until five business days elapsed from the time he received it, to give him an opportunity to fully discern each and every provision thereof. It was only after such full disclosure was effected and the five business day "waiting period" had elapsed that Respondent Ticknor deliberately elected to execute his Choice Hotels franchise agreement.

Finally, the Ninth Circuit further erred in declaring the subject franchise agreement arbitration clause "unconscionable" purportedly because it was not reciprocal. In fact, as this Court will note, the subject arbitration clause was completely reciprocal save for three claims which could exclusivity vest in Choice Hotels — indemnification claims against Ticknor (under the franchise agreement, Ticknor could have no indemnification claim against Choice Hotels); enforcement of Choice Hotels' intellectual property rights (Ticknor conferred no corollary rights to Choice Hotels under the subject franchise agreement); and, collection of monies

owed under the franchise agreement (Ticknor could have no such claim against Choice Hotels, as Choice Hotels had no financial obligation whatsoever to him under the franchise agreement). Each and every other claim which petitioner Choice Hotels had against Respondent Ticknor had to be pursued through arbitration, reciprocal to Ticknor's obligation to pursue claims he had against Choice Hotels through arbitration. (Even were this not so, the subject arbitration clause would still not be defective — Montana law actually holds that an arbitration clause vesting discrepant rights in the parties thereto is not, for that reason alone, "unconscionable.")

Indeed, we trust that this Court will note the irony that the case *sub judice* had its genesis in Choice Hotels' commencing just such an arbitration proceeding against Respondent Ticknor.

Simply stated, the Ninth Circuit's determination that the subject franchise agreement's arbitration provision was an unconscionable and unenforceable "contract of adhesion" is antithetical the law of Montana (upon which the Ninth Circuit purportedly relies) and the law of Maryland. What we have here is not the "take it or leave it" parking garage contract-receipt which is wholly one-sided, never read and hardly subject to negotiation. Nor do we confront a setting analogous to that in *Iwen* (the Montana Supreme Court decision relied upon by the Ninth Circuit, as cited and discussed below), in which a consumer had to choose between a "take it or leave it" Yellow Pages listing contract or forego advertising altogether in the only Yellow Pages serving his market area.

No, the setting here is radically different. Respondent Ticknor could have remained independent, but freely chose

to pursue a franchise relationship. Respondent Ticknor had thirty one alternative franchise relationships to select from — he deliberately spurned same in favor of pursuing a franchise relationship with Choice Hotels. As required by law, Respondent Ticknor received full and complete pre-sale disclosure regarding every aspect of the franchise agreement he would have to enter into to become a Choice Hotels franchisee — including the subject arbitration clause at issue herein. As part of that pre-sale disclosure, Respondent Ticknor received a specimen copy of the franchise agreement (containing the subject arbitration clause) for his and his advisors' review. By law, Choice Hotels had to forbid Respondent Ticknor from executing the subject franchise agreement until five business days had elapsed following his receipt of same, further to enable Respondent Ticknor to make a calculated and deliberate contracting decision.[3]

It was only after Respondent Ticknor selected Choice Hotels as the franchise opportunity he wanted to pursue (to the exclusion of thirty one others); after all of the aforementioned disclosure had been effected; after the aforementioned statutorily-imposed "review" period had elapsed; and, after Respondent Ticknor thus had the opportunity to fully comprehend each and every provision of the subject franchise agreement — including its arbitration clause, which was entirely reciprocal save for claims which could vest solely in petitioner Choice Hotels — that Respondent Ticknor put pen to paper and executed the Choice Hotels franchise agreement whose terms he now complains of.

Under such circumstances, the law defeats any suggestion that Respondent Ticknor's franchise agreement

3. FTC Franchise Rule, *infra* at fn.7, § 436.1(g).

was a "contract of adhesion" whose arbitration clause is unenforceable due to purported "unconscionability." Respectfully, the Ninth Circuit erred when it decided otherwise. And unless that decision is reviewed and thereafter reversed by this Court, then the very bedrock upon which franchising rests — franchise network uniformity achieved through franchise agreement uniformity — will be placed in grave peril. So, too, will the Federal Arbitration Act and the Lanham Act.

ARGUMENT

I. A FRANCHISE NETWORK'S FRANCHISE AGREEMENTS ARE *PER FORCE* UNIFORM — BUT, GIVEN THE UNIVERSE OF FRANCHISE ALTERNATIVES AVAILABLE TO A PROSPECTIVE FRANCHISEE, THEY MAY NOT BE DEEMED UNENFORCEABLE "CONTRACTS OF ADHESION"

The lynchpin upon which the Ninth Circuit's decision *sub judice* rests is fundamentally flawed — the holding that the subject Choice Hotels franchise agreement is a "contract of adhesion" since, like virtually all franchise agreements of any given franchise network extant in the United States, it is a uniform contract subject to little (if any) negotiation.

True it is that a franchise network's franchise agreements are virtually always uniform — they have to be. Franchising's bedrock is the public's demand for uniformity. It is that demand which had led to an explosion of franchise activity over the past fifty years, to the point where the U.S. General Accounting Office estimates that today upwards of fifty

percent (50%) of all retail sales in this country — $1 trillion worth — are transacted in franchised outlets.[4]

Franchisors respond to the public's demand for uniformity with uniformity. Indeed, without uniform franchise unit appearance and operations attendant to a network operating under the same name and commercial symbol, the intent and expectation of the Lanham Act, *supra.*, would be contravened. So it is that the Big Mac is prepared identically in the State of Washington as it is in Washington, D.C. Each 7-Eleven store carries virtually the same merchandise as every other. Midas Muffler shops are largely indistinguishable one from another. Each franchised hotel in the Embassy Suites chain operates under the same name; utilizes the same reservation service; and, features guestrooms tailored to the uniform specifications of the franchisor applicable to the size and location of the hotel involved.

It is elementary, but nevertheless true, that a franchise network's uniformity can only be achieved through its use of uniform franchise agreements. These agreements require all franchisees of any given network to conduct business under the same name; build their units in the same way; and, in all aspects of operations, adhere to an identical business format geared to satisfy the public's demand for uniformity. Without such uniform (and frequently nonnegotiable) franchise agreements, the bedrock of franchising would crumble.

But contrary to the Ninth Circuit's flawed analysis, the uniformity and (in many cases) non-negotiability of a

4. GAO-01-776, *Federal Trade Commission Enforcement of the Franchise Rule*, July, 2001 at 5.

network's franchise agreements do not *ipso facto* render them "contracts of adhesion". Because the simple fact is that Respondent Ticknor was not confronted with the type of contract or contractual setting present in the Montana Supreme Court case upon which the Ninth Circuit relies, *Iwen v. U.S. West Direct*, 293 Mont. 512, 977 P.2d 989 (1999). In *Iwen*, as the dissent in the Ninth Circuit's decision *sub judice* observed, the contract at issue was imposed upon a consumer seeking to place an advertisement in the local Yellow Pages, which consumer had to either accept the contract as presented or forego advertising in the only Yellow Pages serving his market area.

However, Respondent Ticknor confronted no such compulsory contractual setting. To the contrary, Ticknor need not have executed a franchise agreement at all; he could have elected to operate his hotel independently, as so many thousands of hotels do. Having elected to pursue a franchise relationship, Respondent Ticknor had a plethora of other hotel franchise opportunities to select from — yet chose Choice Hotels deliberately, even after receiving full disclosure, as required by law (as discussed *infra*.) regarding the Choice Hotel franchise agreement and, in particular, the arbitration clause at issue herein. Indeed, in franchisee Ticknor's guest lodging segment, there were at least thirty (31) distinct guest lodging chains which Respondent Ticknor could have sought to affiliate with but did not, instead freely electing to enter into the subject Choice Hotel franchise agreement which he now contends is adhesive and unconscionable.[5]

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5. These other chains include: AmeriSuites; Holiday Inns; Holiday Inn Express; Best Inns and Suites; Candlewood Suites; Country Inns and Suites; Courtyard by Marriott; Days Inns; Econo Lodges; Embassy Suites; Fairfield Inns by Marriott; Hampton Inns (Cont'd)

In such circumstances, where franchisee Ticknor was in no fashion compelled to enter into a contract at all, and was in no fashion compelled to enter into a contract with Choice Hotels, but instead freely elected to do so while excluding thirty one other franchise opportunities, a franchise network's uniform contract may not be deemed a contract of adhesion simply because of its uniformity. To the contrary, the courts of Maryland and Montana have held that contractual choice actually obviates any finding of adhesion.

For example, the Montana Supreme Court itself has held that when a party having a choice among vendors nevertheless voluntarily elects to enter into an otherwise adhesive contract with one such vendor, no principles of adhesion apply. In *Chor v. Piper, Jaffray & Hopwood, Inc.* 261 Mont. 143, 862 P.2d 26 (1993), a securities brokerage customer commenced a judicial action for alleged brokerage misconduct and, in turn, the brokerage house moved to compel arbitration pursuant to the customer's contract. Rejecting the customer's claim that her brokerage house agreement was a "contract of adhesion" whose arbitration provisions were thus enforceable, the Montana Supreme Court held:

> This claim is not convincing in light of (plaintiff's) deposition testimony. (She) testified that since 1983 she had investment accounts with five other

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(Cont'd)
and Suites; Hawthorne Suites; Hilton Hotels; Homewood Suites; Howard Johnson; Knights Inn; Microtel Inns and Suites; Motel 6; Hampton Inn Suites; Radisson Hotels; Ramada; Red Roof; Residents Inns by Marriott; Rodeway Inns; Super 8 Motels; Townplace Suites by Marriott; Travelodge Hotels; Villager Lodge; Wellesley Inns & Suites; and, Wingate Inns. *Source*: International Franchise Association, *Spring/Summer 2001 Franchise Opportunities Guide*, at 187-193.

> brokerage houses besides Piper, none of which required her to consent to arbitrate future disputes. **She clearly had the ability to go elsewhere if the terms of the agreement with Piper did not suit her.** *Id.* at 150 (emphasis added).

Accordingly, the Montana Supreme Court held that the court below ". . . erred in concluding the (subject) arbitration agreements are void due to unconscionability or because they are contracts of adhesion." *Id. See also* the Montana Supreme Court's 1986 decision in *Passage v. Prudential-Bache Securities, Inc.*, 223 Mont. 60, 727 P.2d 1298 (1986) ("We conclude that even if the customer agreement form is an adhesion contract, there is nothing in the record and no compelling law to prevent enforcement of the arbitration clause").

Should this Court determine to apply Maryland law to the case *sub judice*, the same result will pertain. For Maryland, too, holds that when a party to a contract is not dealing with a sole source supplier of goods and services, but rather has options available to procure the subject good or service from another source, then no "contract of adhesion" argument will pertain. For example, in *Seigneur v. National Fitness Institute, Inc.*, 132 Md. App. 271, 752 A.2d 631 (Md. Ct. of Special Appeals 2000), a health club member injured while exercising complained that the subject health club membership agreement was a contract of adhesion. The contract was uniform, held the court, but it noted that this fact alone did not demonstrate that the defendant health club had grossly disparate bargaining power. The court observed:

> . . . (T)here were numerous other competitors providing the same non-essential services as

> (defendant) NFI . . . To possess a decisive bargaining advantage over a customer, the service offered must usually be deemed essential in nature (citation omitted). The Washington metropolitan area, of which Montgomery County is a part, is home to many exercise and fitness clubs. (Plaintiff) . . . was free to choose among the scores of facilities providing essentially the same services (citation omitted). She also had the option of purchasing her own fitness equipment and exercising at home or of exercising without any equipment by doing aerobic or isometric exercises. (Plaintiff's) bargaining position was not grossly disproportionate to that of (defendant) NFI. *Id.* at 283, 285-286.

Indeed, the Ninth Circuit itself has observed — in a franchise-related decision post-dating that under review — that non-negotiable franchise agreements are not *ipso facto* unenforceable "contracts of adhesion". In reversing the U.S. District Court and directing a franchisee to arbitrate his dispute as his franchise agreement directed, the Ninth Court very recently observed:

> (E)ven if "arbitration agreements are adhesive — i.e., . . . they were offered on a take it or leave it basis with no opportunity for bargaining", under California law, they still may be valid and enforceable, absent evidence that they are so unconscionable, that is, "so one-sided as to shock the conscience" (internal quotation marks omitted).[6]

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6. *Bradley v. Harris Research, Inc.*, 2001 WL 1658728 (9th Cir. 2001) citing and quoting from *Lagataree v. Luce Forward, Hamilton & Scripps LLP*, 74 Cal. App. 4th 1105, 88 Cal. Rptr. 2d 664, 678-79 (1999).

II. THE SUBJECT ARBITRATION CLAUSE WAS NEITHER UNCONSCIONABLE NOR OUTSIDE THE PARTIES' REASONABLE EXPECTATIONS — AND THE NINTH CIRCUIT IGNORED MONTANA LAW IN HOLDING OTHERWISE

The Ninth Circuit, while purportedly seeking to ascertain and follow applicable Montana law, actually ignored that law in the case *sub judice*.

Montana law is clear — and is even quoted correctly in the Ninth Circuit decision *sub judice*:

> To determine the enforceability of a specific contractual provision under *Iwen*, a Montana court must first decide whether the contract is one of adhesion [citation omitted]. If so, then the provision will not be enforced against the weaker contracting party if it is (1) not within that party's reasonable expectations, or (2) if within those expectations, it is unduly oppressive, unconscionable, or against public policy (citing *Iwen v. U.S. West Direct, supra*, and *Passage v. Prudential-Bache, Sec., Inc., supra*.). 265 F.3d at 939.

As set forth below — and as forcefully noted in the Ninth Circuit's dissent in this case — the subject franchise agreement's arbitration clause was indisputedly within Respondent Ticknor's reasonable expectations; not at all unconscionable; and, is utterly distinguishable from that present in the *Iwen* case.

A. The Subject Arbitration Clause Was Indisputedly Within The Parties' Expectations

Respondent Ticknor cannot credibly assert that the arbitration provision at issue herein was not within his "reasonable expectations," and the Ninth Circuit erred by ignoring this second prong of the two prong *Iwen* "unconscionability" test when rendering its decision.

As this Court is well aware, franchising is heavily regulated in the United States by both the federal and state governments. The Federal Trade Commission[7] and fourteen (14) states[8] have laws or regulations on their books requiring

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7. *Federal Trade Commission Trade Regulation Rule:* Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, *16 CFR 436, hereafter the "FTC Franchise Rule."*

8. California: California Franchise Investment Law, California Corporations Code, Div. 5, Parts 1-6, Section 31000 *et. seq.*; Hawaii: Hawaii Franchise Investment Law, Hawaii Rev. Stat., Title 26, Ch. 482E, Section 482-E1 *et seq.*; Illinois: Illinois Franchise Disclosure Act, Illinois Compiled Statutes, Ch. 815, Section 705/1 *et seq.*; Indiana: Indiana Franchise Disclosure Law, Indiana Code, Title 51, Ch. 51-19, Section 51-19.01 *et seq.*; Maryland: Maryland Franchise Registration and Disclosure Law, Ann. Code of Maryland, Business Regulation, Title 14, Section 14-201 *et seq.*; Michigan: Michigan Franchise Investment Law, Michigan Compiled Laws, Ch. 445, Section 445.1501 *et seq.*; Minnesota Franchise Act, Minnesota: Minnesota Statutes, Ch. 80C, Section 80C.01 *et seq.*; New York: New York Franchise Act, New York General Business Law, Art. 33, Section 680 *et seq.*; North Dakota: North Dakota Franchise Investment Law, North Dakota Century Code Ann., Title 51, Ch. 51-19, Section 51-19-01 *et seq.*; Rhode Island: Rhode Island Franchise and Distributorship Investment Regulations Act, (Cont'd)

franchisors to disseminate comprehensive "franchise disclosure documents" (prospectus-type circulars) to prospective franchisees prior to offering or selling any franchise. Under most of the above-referenced state laws, franchisors must register their franchise disclosure documents prior to offering or selling any franchise in the subject franchise-regulating state — as Choice Hotels did in this case.

Critically, this franchise disclosure document must highlight any forum selection or arbitration clause which would limit either litigation or arbitration venue, compel arbitration, or both.[9] Included in each franchise disclosure document must be specimen copies of all franchise and

(Cont'd)
General Laws of Rhode Island, Title 19, Ch. 28.1, Section 19-28. 1-1 *et seq.*; South Dakota: South Dakota Franchises for Brand-Name Goods and Services Law, South Dakota Codified Laws, Title 37, Ch. 37-5A, Section 37-5A-1 *et seq.*; Virginia: Virginia Retail Franchising Act, Virginia Code, Title 13.1, Ch. 8, Section 13.1-557 *et seq.*; Washington: Washington Franchise Protection Act, Revised Code of Washington, Title 19, Ch. 19.100, Section 19.100.010 *et seq.*; Wisconsin: Wisconsin Franchise Investment Law, Wisconsin Stats., Ch. 553, Section 553.01 *et seq.*

9. "Guidelines for Preparation of the Uniform Franchise Offering Circular and Related Documents", Item 17 Instructions, Sections "u" and "v", *CCH Business Franchise Guide*, ¶ 5760. The UFOC Guidelines are promulgated and periodically updated by the North American Securities Administrators Association ("NASAA"), whose predecessor created the UFOC disclosure format to eliminate the "patchwork quilt" of confusion engendered by the varying (and sometimes conflicting) disclosure requirements imposed by the fourteen franchise-regulating states. The Federal Trade Commission and each franchise-regulating state has decreed that a franchisor's use of the UFOC document will satisfy that franchisor's disclosure obligations.

franchise-related agreements that a prospective franchisee may or will be asked to enter into.[10]

So it is that Respondent Ticknor was apprised not once, not twice, but three times of the details of the litigation and arbitration provisions present in the Choice franchise agreement: first in Choice's franchise disclosure document (the narrative text of which specifically made reference to same in compliance with the above-referenced "UFOC Guidelines"); second in the specimen franchise agreement which, pursuant to those guidelines, was set forth in Choice's disclosure document; and, third in the actual Choice franchise agreement tendered to franchisee Ticknor for execution.

By law, Choice Hotels had to forbid Respondent Ticknor from executing the subject franchise agreement until five business days had elapsed following receipt of same, further to enable Respondent Ticknor to make a calculated and deliberate contracting decision.[11]

It is thus readily apparent that franchisee Ticknor cannot be heard to complain that the subject franchise agreement's arbitration provisions were not within his "reasonable expectations." It is not at all apparent, however, why the Ninth Circuit chose not to even mention the broad disclosure regarding arbitration, or the regulatorily prescribed "waiting period" which preceded Ticknor's execution of his franchise agreement, when considering whether same was "unconscionable."

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10. *Id.* at ¶5774.

11. FTC Franchise Rule, *supra* at fn.7, §436.1(g).

B. The Subject Arbitration Clause Was Not Unconscionable

Critical to the Ninth Circuit's decision in this case is the conclusion that the subject franchise agreement's arbitration clause was "unconscionable" under Montana law " . . . because it required binding arbitration of the weaker bargaining party's claims, but allowed the stronger bargaining party the opportunity to seek judicial remedies to enforce contractual obligations." 265 F.3d at 940. More specifically, observed the court below, because "(t)he arbitration clause in this case allowed Choice to bring its claims against Ticknor into state or federal court, yet forced Ticknor to submit all claims to binding arbitration as Choice's headquarters in Maryland." *Id.* at 940.

In so holding, the Ninth Circuit erred in many critical respects. To begin with, and as noted in the Ninth Circuit's dissent opinion (*Id.* at 943 and fn.7), the subject arbitration clause did not permit the franchisor to bring all claims against its franchisee in court while relegating its franchisee solely to arbitration. To the contrary, the franchisor's ability to go to court was limited to three instances which had no corollary for the franchisee — to pursue indemnification claims against the franchisee (the franchisor did not indemnify the franchisee, who could thus not pursue any such claim); to enforce the franchisor's trademark rights (again, the franchisee conferred no such rights to the franchisor under the subject franchise agreement); and, to collect monies owed under the franchise agreement (the franchisee could have no such claim against Choice, as Choice owed no monies whatsoever to the franchisee under the franchise agreement).

Each and every other claim which Petitioner Choice had against Respondent Ticknor had to be pursued through

arbitration. Indeed, we trust that it has not escaped this Court's attention that this case emanated from Petitioner Choice's commencement of an arbitration proceeding against Respondent Ticknor.

More critically, the Montana Supreme Court in *Iwen, supra.* — upon which the Ninth Circuit's decision rests almost entirely — actually holds that an arbitration clause vesting discrepant rights in the parties thereto is not automatically "unconscionable." To the contrary, the Montana Supreme Court in *Iwen* held:

> Certainly, this does not mean arbitration agreements must contain mutual promises that give the parties identical rights and obligations, or that the parties must be bound in the exact same manner. This simply restates the rule of law that disparities in the rights of the contracting parties must not be so one-sided and unreasonably favorable to the drafter, as they are in this case, that the agreement becomes unconscionable and oppressive (citation omitted) 293 Mont. 522-23.

Of course, in *Iwen*, the subject arbitration clause was truly "one way" — that is, the purchaser of Yellow Pages advertising thereunder was compelled to arbitrate all disputes, while the Yellow Pages publisher was free to litigate. In the case *sub judice*, as noted immediately above, there is no such disparity of arbitral obligations — only a carveout therefrom conferred upon franchisor Choice to pursue claims that only it could possess.

* * *

Respectfully, the Ninth Circuit committed reversible error by holding the subject Choice franchise agreement's arbitration provision "unconscionable." That arbitration clause was disclosed again and again to Respondent Ticknor by Petitioner Choice; the obligations contained therein were completely reciprocal save for claims that could vest solely in Choice (and never in Respondent Ticknor); and, even after such repeated disclosure regarding the subject arbitration provision, Respondent Ticknor of his own volition determined to pursue a franchise relationship instead of remaining independent; freely elected to execute his Choice franchise agreement; and, deliberately rejected the franchise offerings of fully thirty one (31) other guest lodging franchises available for him to select from.

CONCLUSION

For all of the reasons set forth herein, it is respectfully submitted that the petition for a writ of *certiorari* sought herein by Petitioner Choice Hotels International, Inc. should be granted.

Respectfully submitted,

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